Appeal No. 2006AP2662 **Cir. Ct. No. 2005CV78**

WISCONSIN COURT OF APPEALS
DISTRICT III

JONATHAN LISOWSKI,

PLAINTIFF-APPELLANT,

V.

HASTINGS MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

FILED

Aug. 23, 2007

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Lundsten, JJ.

Jonathan Lisowski appeals an order dismissing his claim against Hastings Mutual Insurance Company for underinsured motorists (UIM) coverage. The trial court concluded that our decision in ***Crandall v. Society Insurance***, 2004 WI App 34, 269 Wis. 2d 765, 676 N.W.2d 174, required dismissal. We, of course, are also bound by the holding in ***Crandall***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Because we believe that grounds may exist to overrule or modify ***Crandall***, we certify the appeal to the Wisconsin Supreme Court for its review and determination pursuant to WIS. STAT. RULE 809.61 (2005-06).[1]

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Jonathan was severely injured in an auto accident while riding as a passenger in a car owned by his father, Dennis Lisowski. The driver of the car, a friend of Jonathan, caused the accident. After settling claims against the driver, Jonathan sued Hastings alleging UIM coverage under the "Wisconsin Underinsured Motorists Coverage" endorsement to a business auto policy Dennis had purchased from Hastings.

The declarations in the policy limited all coverages, including UIM, to "covered autos." The policy identified one of the vehicles Dennis owned as a "covered auto," but not the car involved in Jonathan's accident. However, the stated purpose of the UIM endorsement was to modify the policy.[2] The issue we certify is whether the endorsement extended UIM coverage to injuries from the use of vehicles that were not identified in the policy as "covered autos."

Provisions in the coverage section of the endorsement persuasively, if not conclusively, support Jonathan's contention that he was covered under the policy. The endorsement provided that Hastings would compensate an "insured" for damages caused by the use of an "underinsured motor vehicle." Jonathan was an "insured" under the endorsement, as a member of Dennis's family. The accident vehicle here was plainly an "underinsured motor vehicle" under the endorsement's definition of that term, which contains no "covered auto" limitation.[3]

[2] The first line of the endorsement stated, in capital letters, that "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY."

[3] For purposes of the endorsement:

(continued)

However, in ***Crandall*** we determined coverage in a similar UIM endorsement by construing an introductory provision as a further limitation on coverage. *See* 269 Wis. 2d, ¶8. That provision, in the ***Crandall*** endorsement and here, stated that "for a covered 'auto' licensed or principally garaged, or 'garage operations' conducted in Wisconsin, this endorsement modifies [the policy]." ***Id.***, ¶2. We considered and rejected the argument that this provision was simply a choice of law provision. *See* ***id.***, ¶¶7-8, 12. "Rather, the statement indicates when the UIM coverage applies and when it does not apply." ***Id.***, ¶12. Consequently, we concluded that there can be no UIM coverage under the endorsement unless the accident involved a covered auto or the insured was engaged in garage operations at the time of the accident. ***Id.***, ¶13.

The introductory provision ***Crandall*** relied on is plainly inconsistent with the provisions that follow it. We have previously struggled with this inconsistency in ***Ruenger v. Soodsma***, 2005 WI App 79, 281 Wis. 2d 228, 695

> "Underinsured motor vehicle" means a land motor vehicle or "trailer" for which the sum of all liability bonds or policies at the time of an "accident" provides at least the applicable minimum limit for bodily injury liability specified by WIS. STAT. Section 344.15.
>
> However, "underinsured motor vehicle" does not include any vehicle:
>
> a. Owned or operated by a self-insurer under any applicable motor vehicle law;
>
> b. Owned by a governmental unit or agency;
>
> c. Designed for use mainly off public roads while not on public roads; or
>
> d. That is an "uninsured motor vehicle".

N.W.2d 840,[4] a case that involved the same UIM endorsement and a claim for damages suffered by one who, like Jonathan, was insured under the endorsement and suffered damages from use of an underinsured vehicle that was not a "covered auto" in the policy. In ***Ruenger***, we stated that:

> We agree … that the coverage section of the UIM endorsement, when read alone, provides coverage for [Ruenger's] injuries because they were caused by an accident and she is legally entitled to recover compensatory damages for them from the driver of an underinsured motor vehicle whose liability results from the use of the underinsured motor vehicle.

Id., ¶31.

We also acknowledged the reasonableness of Ruenger's contentions that the introductory statement "does not attempt to define or limit the circumstances under which UIM coverage will apply, but simply states that the endorsement modifies insurance provided under the [policy]," and that a reasonable insured would read the coverage section of the endorsement, which does not mention covered autos, to understand the scope of UIM coverage. ***Id.***, ¶33.

Nevertheless, we concluded that we had no choice but to enforce the "covered auto" limitation in the endorsement's introduction or be "flatly inconsistent with our construction of that same language in ***Crandall***, and we may not modify, overrule, or withdraw language from our prior decision. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997)." ***Id.***, ¶34.

[4] No petition for review was filed in ***Ruenger v. Soodsma***, 2005 WI App 79, 281 Wis. 2d 228, 695 N.W.2d 840.

As in ***Ruenger***, we believe we must resolve the inconsistencies in the UIM endorsement by following ***Crandall***. As we stated in ***Ruenger***, the argument that the ***Crandall*** holding "is not a reasonable construction of the introductory language or that the language is ambiguous must be directed to the supreme court." ***Ruenger***, 281 Wis. 2d 228, ¶34. We believe that this case is the appropriate means by which the supreme court can and should now resolve the issue.